

APR 18 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON

U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSE MARTINEZ,

Defendant-Appellant.

No. 00-50270

D.C. No. CR-99-03113-MJL

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding

Deferred January 18, 2001 **
Resubmitted April 13, 2003
Pasadena, California

Before: BEEZER, T.G. NELSON, and BERZON, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* FED. R. APP. P. 34(a)(2).

Jose Martinez challenges his sentence of twenty-four months for importation of marijuana in violation of 21 U.S.C. § 960. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Martinez waived his right to appeal the district court's two-point sentence enhancement under U.S. Sentencing Guideline § 3B1.4 by failing to raise it in his opening brief. "We 'will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief.'"¹ We conclude that the circumstances of this case do not warrant deviating from this general rule.²

Although Martinez did not waive his right to challenge the constitutionality of 21 U.S.C. § 960,³ *United States v. Mendoza-Paz*⁴ forecloses his argument.⁵

His final argument, that § 960 requires knowledge of the type and quantity of the controlled substance at issue, fails as well. When drug quantity and type expose a defendant to a higher statutory maximum sentence than he would

¹ *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992) (quoting *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986)).

² *See id.* (describing exceptions to general rule).

³ *See United States v. Caperell*, 938 F.2d 975, 977 (9th Cir. 1991) (stating that a guilty plea does not waive jurisdictional challenges, such as challenges to a statute's constitutionality).

⁴ 286 F.3d 1104 (9th Cir.), *cert. denied* 123 S. Ct. 573 (2002).

⁵ *Id.* at 1109–10.

otherwise receive, knowledge and quantity must be charged and proved.⁶ In circumstances such as these, however, when drug quantity and type did not expose a defendant to a higher maximum sentence, no such requirement applies.⁷

Therefore, we AFFIRM.

AFFIRMED.

⁶ See *United States v. Minore*, 292 F.3d 1109, 1117 (9th Cir. 2002), *cert. denied* 123 S. Ct. 948 (2003).

⁷ See *id.*; see also *United States v. Carranza*, 289 F.3d 634, 644 (9th Cir.), *cert. denied* 123 S. Ct. 572 (2002).